

# Dr. Strangelaw, or How I Learned to Stop Worrying and Love Pop Culture

Donald Papy

How a law teacher comes to teach a particular subject can be instructive. New teachers are likely to select the subjects in which they specialized in law practice. A rookie chooses a course he or she loved in law school, or the dean asks a new recruit to teach something that nobody else on the faculty wants to teach. In this article I'll explain how I became interested in teaching law and popular culture; I hope to illuminate the value of this subject for both teaching and scholarship.

## A. How I Came to Teach Law and Popular Culture

### *1. The Clarence Thomas Confirmation Hearing*

I was deeply interested in employment discrimination and served as an attorney for the U.S. Equal Employment Opportunity Commission (EEOC) in the Miami district office. As a result, I taught employment discrimination as well as other courses initially as a full-time instructor at the University of Miami School of Law. Later, I returned to law practice, primarily in this area of law, but I continued teaching it as an adjunct faculty member.

A few years later, in 1989, I attended a luncheon in Miami where the featured speaker was Clarence Thomas, then the chair of the EEOC. My tenure at the agency overlapped in part with his. After the luncheon I introduced myself and mentioned that I had been an attorney for the EEOC in its Miami office. Thomas said he would be interested in talking to me about my experiences at the agency; his tenure to that point had been difficult.

Several months later, I received a call from the Washington office of the EEOC, asking if I would be able to meet Thomas while he was visiting the Miami EEOC office. I agreed, and we met for breakfast. The conversation mostly concerned my experiences in the Miami office and his as chair in Washington. At the end of the meeting, he asked if I would be willing to come to Washington to continue our discussion. I said yes. A short time later, Thomas was nominated to become a judge on the United States Court of Appeals for the District of Columbia Circuit and was ultimately confirmed. Understandably, I never received a call to continue our discussion.

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In 1991 Thomas was nominated to become a Supreme Court justice. The nomination process took an unexpected turn when then-law professor Anita Hill came forward with explosive allegations that Thomas had sexually harassed her when they had worked together at the U.S. Department of Education and then at the EEOC. The controversy led to a live TV hearing before the Senate Judiciary Committee that rocked the nation. Television stations scrambled to find commentators who could explain to the public what was happening from a legal perspective. Both the public and the senators conducting the hearing seemed woefully unaware of the legal concept of sexual harassment.<sup>1</sup>

I received a call from a local Miami TV station asking if I would appear on the air to discuss the situation, based on my practice in the field, my employment at the EEOC, and my teaching at the law school. When they learned that I had met Thomas, the station was even happier. I had appeared on TV before, but nothing prepared me for what was about to happen. After my appearance on one station, other local stations<sup>2</sup> began calling and putting me on the air. One of the stations even asked to put cameras into my classroom the evening of the vote to find out what my students thought about the matter.

I was invited to appear live at the TV studio at noon on the day of the final vote. Right before going on the air, the host asked what I thought would be the outcome of the voting. I was taken aback by this question, since I had been invited because of my expertise in employment discrimination law, not politics. The producer assured me that they would not ask that question when we went on the air. As soon as the show went live, the host asked me what I thought the outcome of the vote would be that night. After glaring at the host (and glancing over at the producer off-camera), I gave a noncommittal answer and then talked about the legal issues.

That live talk show was mild compared with the others that I experienced. I knew that the TV interviewers were not knowledgeable in the area of law that was producing the news. But what I encountered surprised and ultimately disappointed and even frightened me: They neither knew nor cared about the law. They were interested primarily in Hill's salacious allegations and what attention-grabbing comment they could make about them. Many were openly cynical about judges and the legal system and did not seem to care about the law or the bigger picture. It seemed obvious that of primary importance was the ratings.

I also began to realize that most lawyers probably knew little or nothing about employment discrimination law, let alone sexual harassment. At the time, many law firms, including Baker McKenzie, one of the largest firms in the world, seemed to be getting in trouble with sexual harassment claims.<sup>3</sup> If

1. Five years earlier, the Supreme Court held that sexual harassment violates Title VII of the Civil Rights Act of 1964. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
2. This was before the proliferation of cable networks, so the landscape consisted mostly of four over-the-air stations.
3. *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510 (Cal. Ct. App. 1998).

a firm like that didn't understand how to prevent its lawyers from engaging in sexual harassment, how could the general public understand it?

These and other lessons led me to think more deeply about the impact of the media on the legal system. Most people, I reasoned, learned what they knew about the law through the mass media: TV news, fictional TV programs, and films and books about lawyers. Few people use lawyers or even know any. Few people wind up in court for any reason (except perhaps for traffic tickets). Yet juries decide civil and criminal law cases based on what they've learned from viewing thousands of programs or reading countless ill-informed news articles about legal issues. Thus, my early thinking about law and popular culture began to emerge from my own first-person experiences with the media.

## 2. *The Trial of O.J. Simpson*

If the Hill-Thomas hearings began my journey toward teaching law and popular culture, the criminal trial of O.J. Simpson was the game-changing legal event that inexorably led me to want to reach that destination. It is difficult to overestimate the cultural impact of the case. Starting in June 1994 through the conclusion of the criminal trial in October 1995, the nation was transfixed by the gruesome double murder of Simpson's former wife Nicole and her friend Ron Goldman. The prominence of the defendant, a beloved triple-threat celebrity (pro football, movies, and TV commercials), ensured intense public interest in the case, but the combination of violence (including domestic abuse), sex, and race fueled an almost insatiable appetite for news about it. In addition, the involvement of high-profile attorneys, a judge who seemed star-struck by the proceedings, and gavel-to-gavel TV coverage fanned the flames still higher.

More than twenty years later, the O.J. Simpson story remains highly salient. Recently, the case was revisited on television by the miniseries *The People v. O.J. Simpson*<sup>4</sup> and the Academy Award-winning long-form documentary *O.J.: Made in America*.<sup>5</sup> One of the factors driving my interest in law and popular culture was the sheer amount of psychic energy generated by the case. Average citizens became interested in all manner of legal issues such as DNA evidence, hearsay, and the concept of reasonable doubt. Many watched the trial incessantly, at home, at work, at school. A cottage industry of TV commentators sprang to life. Lawyers, law professors, and government officials became omnipresent on television, whether they actually knew anything about criminal law or not. Some commentators leveraged the O.J. case into new media careers, and others produced books on the case.

It seemed to me unprecedented for the public to become so psychically involved in a legal case. This led me to speculate that the O.J. case was changing not only the public's perception of law and lawyers but also the legal system itself, for example by affecting future jurors, federal and state, civil and

4. Showtime miniseries (Feb. 2 to Apr. 5, 2016).

5. (ESPN Films, 2016).

criminal. I concluded that mass media (including both coverage of the O.J. case and countless fictitious pop cultural representations of law and lawyers) is affecting our entire legal system, and its effects could and should be studied. Lawyers and all members of society need to better understand the interaction of mass media and the legal system.

### B. Reading About Law and Popular Culture

After the Thomas confirmation hearing and the O.J. Simpson trial, I began to read some of the literature of the relatively new law and popular culture movement, such as Lawrence M. Friedman's seminal article "Law, Lawyers, and Popular Culture,"<sup>6</sup> and Anthony Chase's "Toward a Legal Theory of Popular Culture."<sup>7</sup> I realized that the study of law and popular culture is closely related to earlier trends in legal scholarship such as legal realism and law and literature. They demonstrated how the legal system is closely connected to broader cultural factors as opposed to being self-contained.

I also reviewed work by George Gerbner,<sup>8</sup> whose research on cultivation theory helps to explain how television influences society. For example, Gerbner demonstrated that people who watch a great deal of local TV news are more likely to subscribe to the "mean world" syndrome, e.g., that crime is increasing despite falling crime rates.

In addition, I came across a book titled *The Unreality Industry: The Deliberate Manufacturing of Falsehood and What It Is Doing to Our Lives*.<sup>9</sup> This book, written by two business school professors, captured the blurring of reality and fiction throughout American society and the predominance of entertainment in the presentation of news. Later came the outstanding book by Professor Richard Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture*.<sup>10</sup>

I also read or reread a number of sources that addressed the same trends. These included historian Daniel Boorstin's brilliant book *The Image: A Guide to Pseudo-Events in America*,<sup>11</sup> which introduced the idea that people now become famous just for being famous, rather than for accomplishing something notable. Another classic work I consulted was Neil Postman's *Amusing Ourselves to Death*,<sup>12</sup> which posited that Aldous Huxley's *Brave New World* was a better

6. 98 YALE L. J. 1579 (1989).

7. 1986 WISC. L. REV. 527 (1986).

8. George Gerbner et al., *Growing Up with Television: Cultivation Processes*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 43-69 (Jennings Bryant & Dolf Zillmann eds., 2d ed. 2002).

9. IAN I. MITROFF & WARREN BENNIS (1989). The authors gave the example of *The People's Court*, then presided over by former Judge Joseph Wapner. This show served as the model for the plethora of daytime reality judge shows such as *Judge Judy*.

10. (2000).

11. (1961).

12. (1985).

guide than George Orwell's 1984 to what the future would become.<sup>13</sup> Finally, in a used bookstore I came across a book titled *Sex, Sin & Mayhem: Notorious Trials of the 1990s*.<sup>14</sup> As if to emphasize its point, despite its subtitle referring to high-profile trials of the 1990s, it was actually published in 1995.

Another reading that shaped my thinking about teaching the course was a 1960 article by Phillip Roth, originally a speech at Stanford University, entitled "Writing American Fiction."<sup>15</sup> I believe it to be one of the earliest expressions of modern reality outstripping fiction. After describing a bizarre yet true story about a gruesome double murder in Chicago in the 1950s, Roth wrote:

. . . the American writer in the middle of the twentieth century has his hands full in trying to understand, describe, and then make *credible* much of American reality. It stupefies, it sickens, it infuriates, and finally it is even a kind of embarrassment to one's meager imagination. The actuality is continually outdoing our talents, and the culture tosses up figures almost daily that are the envy of any novelist . . .<sup>16</sup>

### C. What Law and Popular Culture Is About

I have written previously about what I believe teaching law and culture is and ought to be.<sup>17</sup> Here are some of the basic principles that have guided my approach to the subject:

- \* Most people learn about the law through popular culture, which includes TV, film, books, plays, and all other manner of mass media, generally commercially produced.

- \* Members of the public are voracious consumers of popular culture.

- \* Because law is about conflict and conflict is dramatic, much popular culture involves legal themes, lawyers, and legal disputes—especially trials—which provide ready-made theater.

- \* Entertainment has always been a prime value in society, and this is particularly true today.

- \* Storytelling (narrative) is how we learn about and understand the world and how it operates. In a sense, a trial can be seen as a contest between competing stories; whoever tells the best story wins.

13. Historian Jon Meacham recently wrote an insightful article for *The New York Times* on the topic of celebrity that discusses both Boorstin and Postman's books. *The Man to Blame for Our Culture of Fame*, NEW YORK TIMES (Apr. 26, 2017).

14. EDWARD W. KNAPPMAN (1995).

15. In PHILIP ROTH, *READING MYSELF AND OTHERS* 117-35 (1975).

16. *Id.* at 120.

17. Donald Papy, *More Media and More Countries: New Approaches to Teaching Law and Popular Culture*, in LAW AND POPULAR CULTURE: INTERNATIONAL PERSPECTIVES 369-81 (Michael Asimow, et al. eds., 2014).

\* Mass media affects the legal system in many ways, including influence on legislation, election of judges and prosecutors, and, most significantly, the mindset of jurors.

In summary, it is important to understand how images of law and lawyers are disseminated to the public. This knowledge enables lawyers to help their clients, especially in litigation, but also in lobbying efforts and in creating better public relations for their clients. In addition, it is beneficial for us as consumers of pop culture and as citizens to understand the interaction between law and popular culture.

#### **D. The Future of Law and Popular Culture**

An area of dynamic growth in the study of law and popular culture is the significance of visual images. From the beginning of photography and motion pictures in the nineteenth century to the advent of television in the twentieth, popular culture has been inundated with visual images of lawyers and the legal system. In the twenty-first century, the Internet and social media concept of “going viral” has infected society; policing, in its criminal and civil aspects, is particularly affected by this phenomenon.

At least since the bystander video of the 1991 police beating of Rodney King in Los Angeles, the impact of visual evidence on the law has been growing. The deadly police shooting of Michael Brown in Ferguson, Missouri, and the in-custody death of Freddie Gray in Baltimore resulted in calls for greater accountability and transparency in policing, including the greater use of police body cameras,<sup>18</sup> which many cities have begun to implement. Research is in the early stages but has suggested that deployment of police body cameras diminishes complaints against police and reduces police use of force.<sup>19</sup>

In a new seminar I have developed, “Policing the Police,” we address how new technology, particularly police body cameras, though not a panacea, may be used to increase police legitimacy in the eyes of the public. An area of further study is how juries receive information from police videos. Members of the public are likely to have seen hundreds if not thousands of hours of police encounters on television news, fictional programming, and feature films. How might those images influence the way juries perceive police videos? All the same factors influence the reception of those images (lighting, point of view, quality) regardless of the source of the visual image.<sup>20</sup>

Arrests of unwilling subjects are likely to be violent, sudden, and difficult to fully understand in a police video. Since force is allowed in such circumstances,

18. See, e.g., The Final Report of the President’s Task Force on 21st Century Policing (May 2015).

19. See, e.g., Barak Ariel et al., *The Effect of Police Body-Worn Cameras on the Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial*, 31 J. OF QUANTITATIVE CRIMINOLOGY 509 (2014).

20. See Timothy Williams, Samuel Jacoby & Damien Cave, *Police Body Cameras: What Do You See?*, N. Y. TIMES (April 1, 2016), <https://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html>.

will a juror be able to distinguish the proper from the improper? Experts can be used at trial to explain the videos to a jury, and the officers themselves can be trained to be aware of how their actions, however lawful, may appear on video, something they may be able to consider during the arrest. These are new challenges for police, and the legal system, and the outcome of criminal trials and of civil trials determining liability may often depend on the conclusions drawn from police videos. Because of the power that a visual image may have on a jury (or judge),<sup>21</sup> this is an area worthy of future inquiry.

### E. Conclusion

The study of law and popular culture is an important and worthy part of the law school curriculum. More than just an enjoyable examination of stories about law and lawyers, the study of popular culture helps us understand how the legal system actually operates. Such study informs our understanding of society and helps us train lawyers who will be better equipped to represent clients in the twenty-first century.

Some may consider the study of law and culture to be less valuable than more traditional parts of the curriculum because it examines banal materials. But as Professor Michael Asimow has argued, law and popular culture is worthy of our study despite the provenance of its subject material:

I hope that the readers of these papers will come away with a sense of the value of taking popular culture seriously. It is not just trash to be consumed and instantly forgotten. Popular culture has much to teach us about the world in which we live and about the beliefs of ordinary people concerning law, lawyers, and the legal system. It reminds us that those beliefs are indeed constructed, in large part by the fictitious stories that people consume on film or television. Sometimes, the works of popular culture even teach us about what lawyers do and what is wrong with the law and legal institutions.<sup>22</sup>

21. See *Scott v. Harris*, 550 U.S. 372 (2007) (video of high-speed chase so powerful that eight of nine Justices believed no reasonable jury could conclude that the deadly pursuit was unreasonable). But see Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (experiment demonstrating that subgroups differed on reasonableness of the chase in the video).

22. Michael Asimow, *Introduction to Papers from UCLA's Law and Popular Culture Seminar*, 9 UCLA ENT. L. REV. 87, 88 (2001).